No. 91-8685

# In the Supreme Court of the United States

OCTOBER TERM, 1992

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TERRY LYNN STINSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

The Court granted certiorari limited to the following question, which this Court specified:

"Whether a court's failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under USSG Section 4B1.1, see USSG Section 4B1.2 comment. (n.2), constitutes an 'incorrect application of the sentencing guidelines' under 18 U.S.C. Section 3742(f)(1)."

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## BRIEF FOR THE UNITED STATES

## OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction and sentence, J.A. 85a-96a, is reported at 943 F.2d 1268. The opinion of the court of appeals denying the petition for rehearing, J.A. 97a-102a, is reported at 957 F.2d 813.

## JURISDICTION

The judgment of the court of appeals was entered on October 4, 1991. A petition for rehearing was denied on March 20, 1992. The petition for a writ of certiorari was filed on June 18, 1992, and was granted on November 9, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS AND SENTENCING GUIDELINES INVOLVED

Relevant provisions of the Sentencing Reform Act of 1984 and the Sentencing Guidelines are reprinted in an appendix to this brief.

## STATEMENT

1. On October 31, 1989, petitioner, an escapee from the Mississippi Department of Corrections, J.A. 28a, entered the Sun Bank of Jacksonville, Florida. He approached a customer service employee and, brandishing what appeared to be a hand grenade, said: "Give me the money or I'll throw this in your lap. Hang up the phone and give me the money now." J.A. 10a-11a. Petitioner, who was also carrying a portable radio scanner, said that he did not want any dye packs or bait money and that he wanted money from the drive-through cash drawers. Presentence Report (PSR) 2.

The customer service employee placed money in a plastic bag that petitioner had furnished, while petitioner pointed a sawed-off shotgun at her. PSR 1; J.A. 11a. Petitioner then ordered everyone in the bank to lie down. He threw the grenade, which was later found to be inert, onto the bank floor and left with a total of $9,427 in cash. J.A. 11a. Petitioner fled in a pickup truck, which the police subsequently located near petitioner's apartment. J.A. 20a. The truck contained a sawed-off section of a shotgun barrel and an explosive device. PSR 2; J.A. 20a-21a.

After abandoning the pickup truck, petitioner resumed his flight in a van, which he had stolen earlier that day by telling a salesman in a car dealership that he wanted to test drive it. During the test drive,



petitioner pulled a gun on the salesman and took him to petitioner's apartment. There, petitioner restrained the salesman with handcuffs and rope, confined him in a closet, and warned him that the apartment was rigged with a bomb that would explode if anyone opened the closet door. PSR 2; J.A. 11a.

Petitioner then drove the van to Gulfport, Mississippi, where he was arrested on November 3, 1989. J.A. 12a. The arresting officers recovered more than $6,600 of the stolen currency and the sawed-off shotgun. They also seized three inert grenades, a police radio scanner, ammunition, bomb components, full-size replicas of an M-16 rifle and a semiautomatic pistol, a stun gun, handcuffs, and knives. J.A. 12a, 52a-56a.

2. Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to a five-count indictment. The indictment charged him with armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d) (Count 1); possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g) (Count 2); use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924 (c) (Count 3); possession of an unregistered firearm, in violation of 26 U.S.C. 5861(d) (Count 4); and transportation of stolen property in interstate commerce, in violation of 18 U.S.C. 2312 (Count 5). J.A. 4a-7a, 77a.

Petitioner was sentenced in July 1990. The presentence report recommended that he be sentenced as a career offender under Sentencing Guidelines § 4B1.1 (Nov. 1, 1989). PSR 9. That Guideline provides that "[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of vio-

lence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." United States Sentencing Comm'n, *Guidelines Manual* 4.11 (Nov. 1, 1989) [hereinafter *Guidelines Manual*]. Petitioner was over 18 and had three prior convictions for crimes of violence. The presentence report used petitioner's instant conviction for being a felon in possession of a firearm as the "crime of violence" required by the second prong of the career offender definition. PSR 9.

Petitioner objected to the application of the career offender Guideline, arguing that possession of a firearm by a convicted felon is not a crime of violence and therefore cannot serve as a predicate offense for career offender sentencing. PSR Addendum 2; J.A. 34a-38a. The district court rejected that argument; it held that "the offense of possession of a firearm by a convicted felon is a crime of violence, both by its nature and how the weapon was used in this case." J.A. 44a.

Because the maximum sentence for the firearms possession offense, as enhanced by 18 U.S.C. 924(e), was life imprisonment, petitioner's base offense level under the career offender Guideline was 37. After granting him a two-level credit for acceptance of responsibility, the district court determined that petitioner's adjusted offense level was 35 and his criminal history category was VI, which yielded a Guidelines sentencing range of 292-365 months' imprisonment. J.A. 49a, 74a.[1] The court sentenced petitioner at the

[1] If the district court had used petitioner's armed bank robbery offense as the predicate offense in sentencing him under the career offender Guideline, his base offense level would have been 34, rather than 37 (since armed bank robbery carries a maximum penalty of 25 years' imprisonment, rather than life imprisonment). In that event, his Guidelines sentencing range would have been 210-262 months' imprisonment, rather than 292-365 months' imprisonment.



top of that range "due to the continuing and persistent danger that [he] continues to present to the public and a history of assaultive and violent behavior, as evidenced by the offender's past criminal record." J.A. 84a.

3. On October 4, 1991, the court of appeals affirmed petitioner's conviction and sentence. J.A. 85a. The court first noted that the district court had properly sentenced petitioner under the November 1, 1989, version of the Sentencing Guidelines, because that was the version in effect on the date of sentencing. See 18 U.S.C. 3553(a)(4) and (5). J.A. 87a, 95a.[2] The court then held that possession of a firearm by a convicted felon is "inherently" a crime of violence under Sentencing Guidelines § 4B1.2(1)(ii) (Nov. 1, 1989). J.A. 86a. That Guideline defined a "crime of violence" as one that "involves conduct that presents a serious potential risk of injury to another." The court also relied on Application Note 2 to the 1989 version of Sentencing Guidelines § 4B1.2, which explained that the term "crime of violence" includes offenses in which "the conduct set forth in the count of which the de-

[2] If the 1989 amendments had affected petitioner adversely, applying the 1989 version of the Guidelines would have raised an ex post facto issue, since four of the five charges against petitioner were based on conduct that occurred on October 31, 1989, the day before the 1989 amendments took effect. None of the pertinent 1989 changes were unfavorable to petitioner, however, so there is no ex post facto problem with following the statutory dictate that the court is to apply the Guidelines in effect at the time of sentencing.

fendant was convicted * * * by its nature, presented a serious potential risk of physical injury to another." J.A. 89a.

As of November 1, 1991, the Sentencing Commission amended the commentary to Sentencing Guidelines § 4B1.2. That amendment, designated Amendment 433, stated, *inter alia*, that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." *Guidelines Manual* App. C, amend. 433, at 694-695 (Nov. 1, 1991). Petitioner then sought rehearing in the court of appeals, contending that Amendment 433 should apply retroactively to his sentence.

The court of appeals denied rehearing. J.A. 97a. The court adhered to its original interpretation of Section 4B1.2, "that possession of a firearm by a felon inherently constitutes a 'crime of violence.'" J.A. 102a. The court observed that, before the promulgation of Amendment 433, at least four other circuits had held that a felon-in-possession offense was inherently a violent crime or could qualify as a violent crime in some circumstances, and that "no circuit court had concluded that section 4B1.2's term 'crime of violence' excluded the offense of unlawful possession of a firearm by a felon." J.A. 98a-99a. The court expressed "doubt [that] the Commission's amendment to section 4B1.2's commentary can nullify the precedent of the circuit courts." J.A. 101a. The 1991 commentary to Section 4B1.2 had "limited authority," the court concluded, since it had not "been called to Congress's attention," nor had it "been authorized by Congress." J.A. 101a. Accordingly, the court "decline[d] to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the



possession of a firearm by a felon as a 'crime of violence'" or until the Commission does so and submits the altered text for congressional review. J.A. 102a.

4. On April 30, 1992, the Sentencing Commission submitted Amendment 433 to Congress for review. 57 Fed. Reg. 20,148, 20,157 (1992). Subsequently, on September 16, 1992, the Sentencing Commission published in the *Federal Register* a notice regarding revisions to the Sentencing Guidelines. 57 Fed. Reg. 42,804. One of the revisions that the Commission made was to Sentencing Guidelines § 1B1.10(d) (Policy Statement), which lists the Guidelines that can be given retroactive effect by sentencing courts. The September 16, 1992, revision included Amendment 433 among the provisions that may be applied retroactively. The revision to Sentencing Guidelines § 1B1.10(d) (Policy Statement) took effect on November 1, 1992. 57 Fed. Reg. 42,804, 42,805.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted review of the question whether a court has incorrectly applied the Sentencing Guidelines when it fails to follow Guidelines commentary stating that unlawful possession of a firearm by a felon is not a crime of violence within the meaning of the career offender Guidelines. Analysis of that question proceeds in two steps. The first issue is whether, as a general rule, an amendment to the Sentencing Commission's Guidelines commentary is binding on the courts. The second issue is whether the court of appeals erred in not following the amendment at issue in this case. In our view, courts should generally follow the Sentencing Commission's commentary to the Guidelines, but the court of appeals did not err by refusing to do so in this case.

A. The Sentencing Guidelines are best viewed as legislative rules, which have the effect of law and thereby bind courts in the exercise of their sentencing discretion. The Sentencing Commission's commentary explains how the Guidelines should be applied and is best viewed as an agency's interpretation of its own legislative rules. Such interpretations are entitled to "controlling weight" in determining the scope and application of legislative rules, unless they are contrary to the plain text of the rules or at odds with a governing statutory or constitutional provision. Amendment 433, the 1991 commentary at issue in this case, was neither inconsistent with the text of Sentencing Guidelines § 4B1.2 nor otherwise invalid. The court of appeals was therefore incorrect in concluding that courts could disregard the commentary because it was not formally promulgated as a Guideline.

B. Although we disagree with the rationale of the court of appeals, we believe that the court was nonetheless correct to affirm the sentence in this case. The district court was correct to sentence petitioner as it did, because Amendment 433 had not been proposed or taken effect at the time of petitioner's sentencing. In fact, it did not go into effect until November 1, 1991, more than a year after petitioner was sentenced and a month after his sentence was upheld by the court of appeals.

District courts must apply the Sentencing Guidelines "in effect on the date the defendant is sentenced," 18 U.S.C. 3553(a)(4), and courts of appeals must determine whether a sentence was "imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. 3742(e)(2) and (f)(1). Those provisions make clear that a sentence



imposed in conformity with the Sentencing Guidelines in effect at the time of sentencing is not subject to reversal merely because the Sentencing Commission has subsequently amended its position.

The 1991 amendment to the commentary to Sentencing Guidelines § 4B1.2 was just one part of a comprehensive revision of the Guidelines' scheme for sentencing firearms offenders with prior convictions. In 1990 and 1991, the Sentencing Commission amended the Guidelines to establish enhanced penalties for armed career offenders and for firearms offenders with prior convictions. The change in the commentary to Section 4B1.2 had the compensating effect of ending the use of the career offender Guidelines to sentence defendants charged with felon-in-possession offenses. To give automatic retroactive effect to the change in the commentary to Sentencing Guidelines § 4B1.2 would have the effect of applying one part of the revised scheme for sentencing firearms offenders without applying any other part of that scheme, resulting in a potential windfall to defendants sentenced before November 1, 1991.

Contrary to petitioner's contention, Amendment 433 cannot be viewed as simply an explicit restatement of what was already implicit in Sentencing Guidelines § 4B1.2. Amendment 433 departed from Congress's understanding of the term "crime of violence"; it overruled a considerable body of circuit court precedent; and it was part of a dramatic change in the system for sentencing firearms offenders under the Guidelines. The court of appeals was therefore correct in declining to give Amendment 433 retroactive effect or to treat the Amendment as simply an after-the-fact confirmation of the proper con-

struction of the 1989 version of the career offender Guidelines.

C. Although the court of appeals' judgment should be affirmed, petitioner is not without recourse. While an appellate court cannot remand a case to the district court for resentencing when the Sentencing Commission amends the Guidelines, petitioner can file a motion in the district court seeking to be resentenced. Following the procedure set forth in 18 U.S.C. 3582(c)(2) and Sentencing Guidelines § 1B1.10 (Policy Statement), the Sentencing Commission has recently provided that the commentary at issue in this case may be given retroactive effect. Petitioner is therefore free to move in the district court for resentencing without his felon-in-possession offense serving as the predicate offense for his career offender sentence, and the district court will have the discretion to reduce petitioner's sentence. Accordingly, the proper course for the Court in this case is to affirm the judgment below, with the understanding that petitioner may move in the district court under Sentencing Guidelines § 1B1.10 (Policy Statement) for modification of his sentence in light of Amendment 433.



## ARGUMENT

### THE COURT OF APPEALS PROPERLY UPHELD PETITIONER'S SENTENCE BASED ON THE DISTRICT COURT'S RULING THAT PETITIONER WAS A CAREER OFFENDER WHO HAD COMMITTED A CRIME OF VIOLENCE

#### A. Sentencing Courts Generally Must Follow The Sentencing Commission's Commentary On The Sentencing Guidelines

##### 1. *The Sentencing Guidelines should be treated as the equivalent of legislative rules*

The Sentencing Guidelines are a body of law, not just a collection of suggestions about how district courts should exercise their sentencing discretion. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1987, directs the Sentencing Commission to promulgate "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case," 28 U.S.C. 994(a)(1), and "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation," 28 U.S.C. 994(a)(2). A district court must select a sentence within the range established by the Sentencing Guidelines and Policy Statements that are in effect at the time of sentencing, see 18 U.S.C. 3553(a)(4), (a)(5), and (b); 28 U.S.C. 994(a)(2), unless the court finds an aggravating or mitigating factor of a kind or to a degree not adequately considered by the Sentencing Commission, 18 U.S.C. 3553(b); *Burns* v. *United States*, 111 S. Ct. 2182, 2184-2185 (1991). In reviewing a sentence imposed under the Guidelines, an appellate court must decide whether the sentence

"was imposed as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. 3742(e)(2); see 18 U.S.C. 3742(f)(1). This Court has recognized that "[j]ust as the rules of procedure bind judges and courts in the proper management of the cases before them, so the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases." *Mistretta* v. *United States*, 488 U.S. 361, 391 (1989).

Sentencing Guidelines become law after being promulgated by the Sentencing Commission through the informal rulemaking procedures in 5 U.S.C. 553, and after being submitted to Congress for a report-and-wait period of at least 180 days. 28 U.S.C. 994(p) and (x). They are therefore analogous to legislative rules adopted by federal agencies that are authorized to make law in that way. A legislative rule is the product of an exercise of delegated power to make law through rules. See *INS* v. *Chadha*, 462 U.S. 919, 953-954 n.16 (1983); compare 2 K. Davis, *Administrative Law Treatise* § 7:8, at 36 (2d ed. 1979). As this Court explained in *Batterton* v. *Francis*, 432 U.S. 416 (1977), "[l]egislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission . . . . Such rules have the force and effect of law.'" *Id.* at 425 n.9, quoting Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947); see also *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302-303 (1979).



***2. The Sentencing Commission's commentary on the Sentencing Guidelines should be treated as the equivalent of an agency's interpretation of its own legislative rules***

Sentencing Guidelines § 1B1.7 states that the Sentencing Commission has adopted commentary accompanying the Guidelines to explain how the Guidelines should be applied. It adds that a court's failure to follow the commentary may constitute a misapplication of the Guidelines. Last Term in *Williams* v. *United States*, 112 S. Ct. 1112, 1119 (1992), this Court explained that courts must rely on the Sentencing Commission's policy statements at sentencing, since a policy statement can serve as "an authoritative guide to the meaning of the applicable guideline." Commentary can play the same role. In fact, the Sentencing Commission has stated that commentary regarding departures from the Guidelines should be "treated as the legal equivalent of a policy statement." Sentencing Guidelines § 1B1.7; *United States* v. *Guerrero*, 894 F.2d 261, 265 n.2 (7th Cir. 1990).[3]

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[3] The courts of appeals have generally accorded deference to the Commission's commentary when applying the Guidelines, although ordinarily without much analysis of the legal status of commentary. See, *e.g.*, *United States* v. *Fiore*, No. 92-1601 (1st Cir. Dec. 9, 1992), slip op. 4 (commentary is entitled to deference "unless the Commission's position is arbitrary, unreasonable, inconsistent with the guideline's text, or contrary to law"); *United States* v. *Saucedo*, 950 F.2d 1508, 1514 (10th Cir. 1991) ("we are bound by the commentary unless it cannot be reconciled with the express terms of the guideline"); *United States* v. *Anderson*, 942 F.2d 606, 612-613 (9th Cir. 1991) (en banc); *United States* v. *Smith*, 900 F.2d 1442, 1447 (10th Cir. 1990) (commentary is "essential in correctly and uniformly applying the guidelines");

If the Sentencing Guidelines are equivalent to legislative rules, the Sentencing Commission's interpretation of the Guidelines, as expressed in the Commission's commentary, are equivalent to an agency's interpretation of its legislative rules and should have the same authority that such agency interpretations are ordinarily accorded. In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), this Court set forth the classic formulation of the significance of an agency's interpretation of its own rules. As the Court explained:

> Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

*Id.* at 413-414. This Court has reiterated that principle on a number of occasions since then.[4]

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*United States* v. *DeCicco*, 899 F.2d 1531, 1537 (7th Cir. 1990) ("Courts are required to consider the Commentary in interpreting and applying the Guidelines."); *United States* v. *Smeathers*, 884 F.2d 363, 364 (8th Cir. 1989) (Commission's instruction in commentary in determining how Guideline is to be applied cannot be disregarded).

[4] Accord, *e.g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977); *Northern Indiana Public Service Co.* v. *Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975); *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); 2 K. Davis, *supra*, § 7:22, at 105-106 ("The key idea is that the administrative interpretation is controlling unless plainly erroneous or inconsistent with the regulation."); see *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988); *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986) ("an agency's construction of its own regulations is entitled to substantial deference"). Compare *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-844 (1984) (different standard applicable to an agency's interpretation of a statute).



Deference is accorded to an agency's interpretation of its own rules because agencies "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). In addition, the agency is in a better position than a reviewing court to know the reason a regulation was adopted and the intent of its authors. 2 K. Davis, *supra*, § 7:22, at 107.

The Sentencing Commission was responsible for drafting the initial set of Sentencing Guidelines and Policy Statements, 28 U.S.C. 994(a), and it has the continuing responsibility to "review and revise" the Guidelines in light of "comments and data coming to its attention" from "authorities on" and "institutional representatives of" the federal criminal justice system, 28 U.S.C. 994 (*o*); see 28 U.S.C. 994(r), (s), (u), and (w). The Commission's interpretations of the Sentencing Guidelines, expressed in commentary explaining how the Guidelines should be applied, thus reflect not only the informed judgment of the proponents of the Guidelines themselves, but also a practical understanding of the operation of the Guidelines derived from analysis of data collected from

parties who are most directly involved in their application on a day-to-day basis. See *Mistretta* v. *United States*, 488 U.S. at 369-370 ("[e]very year, with respect to each of more than 40,000 sentences * * * the Commission must review[] the presentence report, the guideline worksheets, the tribunal's sentencing statement, and any written plea agreement"); *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992). For those reasons, as long as the Sentencing Commission's commentary on a Guideline is not clearly inconsistent with the Guideline's text, and is not contrary to the Constitution or the Commission's statutory mandate, the commentary—like any other agency's interpretation of its own legislative rules—is entitled to "controlling weight." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. at 414.[5]

[5] The court of appeals in *United States* v. *Anderson*, 942 F.2d 606 (9th Cir. 1991) (en banc), employed a different analogy. The court first noted that the Sentencing Commission's commentary is entitled to greater weight than legislative committee reports, because commentary is "passed by the whole Commission," unlike legislative history materials, "which could reflect just the views of Congressional staff or of a minority of Congress." 942 F.2d at 611. The court then concluded that the Sentencing Commission's commentary should be given the same weight as the notes of the advisory committees responsible for drafting the Federal Rules of Criminal, Civil, and Appellate Procedure. *Id.* at 611-612. While that analogy is a reasonable one, we believe that the Sentencing Commission's commentary is entitled to even more weight than the advisory committees' notes, because the advisory committees are not responsible for promulgating the federal rules; this Court is. Thus, unlike the Sentencing Commission's commentary, advisory committee notes are not drafted by, and do not necessarily reflect the intent of, the authors of the relevant law.



**B. The Court Of Appeals Properly Refused To Apply Amendment 433 To Petitioner's Case**

Amendment 433 revised the commentary to Sentencing Guidelines § 4B1.2 by stating explicitly that the offense of possession of a firearm by a felon is not a crime of violence for purposes of the career offender Guidelines. That Amendment did not go into effect until after petitioner had been sentenced and his sentence had been affirmed by the court of appeals. Petioner brought the Amendment to the attention of the court of appeals in a rehearing petition, but the court refused to apply the Amendment in petitioner's case, since the court concluded that an amendment to commentary that has not been approved by Congress cannot nullify a decision by a court of appeals. J.A. 101a.

We agree with the result reached by the court of appeals, but we do not subscribe to the court's analysis. We agree with petitioner that the Sentencing Commission's commentary to the Sentencing Guidelines is binding on the courts unless the commentary conflicts with the text of the Guideline or is otherwise plainly erroneous. We also agree with petitioner that the Commission was not required to submit Amendment 433 to Congress before that Amendment could be accorded the full effect of an agency's interpretation of its own rules, since there is no statutory requirement that commentary be submitted to Congress before it becomes effective. Finally, the reasoning of the court of appeals—that a court need not follow an amendment to the commentary if it is inconsistent with circuit court precedent—is at odds with the principle discussed above that, "[i]n construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which be-

comes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977), quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. at 414.

One of the principal reasons that the Commission has ongoing reviewing and revising responsibility for the Sentencing Guidelines is to enable it to resolve disputes among the courts regarding interpretations of the Guidelines and to correct erroneous judicial interpretations of those Guidelines. Just as the Commission can anticipate a point of ambiguity and resolve it in advance through the commentary, it is equally legitimate for the Commission to resolve a point of dispute over the meaning of a Guideline after courts have addressed the issue. If the Commission chooses to resolve the matter by redrafting the Guideline, as it often does, the revision will be binding on the courts (in the absence of a finding that the new Guideline is unauthorized by statute or at odds with the Constitution). But there is nothing to prevent the Commission from proceeding more informally, by altering or adding to the commentary to the Guideline. In that event, the commentary will be as binding as a Guideline would be, unless the commentary is determined to be contrary to the text of the Guideline itself.

Under those principles, the Commission's commentary to Sentencing Guidelines § 4B1.2 should be respected by the courts despite prior judicial precedent construing that Guideline differently. Although the construction of Sentencing Guidelines § 4B1.2 adopted in Amendment 433 was not self-evident, the commentary does not conflict with the text of the



Guidelines, nor is it contrary to any statute or provision of the Constitution.

For the foregoing reasons, we agree that courts should sentence in accordance with Amendment 433 in all cases governed by that Amendment. It does not follow, however, that the court of appeals erred in failing to give retroactive effect to Amendment 433 in this case, since the Amendment did not become effective until more than a year after petitioner was sentenced.

As we discuss below, changes in the Sentencing Guidelines normally are not given retroactive effect, and when they are, the prescribed procedure is for the defendant to move in the district court for resentencing under the amended Guideline. In this case, we submit that the district court properly applied Sentencing Guidelines § 4B1.2 as it stood at the time of sentencing. The court of appeals was therefore correct to affirm the sentence, since a court of appeals is not authorized under the Sentencing Reform Act of 1984 to reverse a sentence that was correct when it was imposed.

### 1. *Appellate courts should not apply Sentencing Guidelines amendments retroactively absent express direction to the contrary in the Sentencing Guidelines*

Congress has directed sentencing courts to apply the Sentencing Guidelines "that are in effect on the date the defendant is sentenced," 18 U.S.C. 3553(a)(4), and has directed the courts of appeals to determine whether a sentence was "imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. 3742(e)(2) and (f)(1). The clear implication of those provisions is that a sentence imposed in conformity with the Sentencing Guide-

lines in effect at sentencing is not subject to reversal under 18 U.S.C. 3742(f)(1) merely because the Sentencing Commission has subsequently amended its position. See *United States* v. *Colon*, 961 F.2d 41, 45-46 (2d Cir. 1992).

That rule is sensible. A sentencing court "could not be expected to anticipate changes made after sentencing." *United States* v. *Colon*, 961 F.2d at 45. And a contrary rule would "provide offenders with a strong incentive to delay appeals, or to take unnecessary appeals, simply in the hope that some suggested change eventually finds embodiment in an amendment that takes effect before the appeal's termination." *United States* v. *Havener*, 905 F.2d 3, 7-8 (1st Cir. 1990).

The Sentencing Reform Act of 1984 and the Sentencing Guidelines specifically address the circumstances under which an amendment to the Guidelines is to be applied retroactively. Congress has imposed on the Sentencing Commission a continuing duty to revise the Guidelines, 28 U.S.C. 994(*o*), and it has also provided that "the court may reduce the term of imprisonment * * * [on the basis of such a revision] if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," 18 U.S.C. 3582(c)(2). It has further required the Sentencing Commission to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for [an offense for which the Guideline penalty is subsequently reduced by an amendment] may be reduced." 28 U.S.C. 994(u). In so doing, "Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect." *Braxton* v.



*United States*, 111 S. Ct. 1854, 1858 (1991). Absent an express determination by the Sentencing Commission to the contrary, Congress has "indicat[ed] that [it] did not wish appellate courts on direct review to revise a sentence in light of changes made by the Commission after the sentence has been imposed." *United States* v. *Colon*, 961 F.2d at 45-46; see *United States* v. *Havener*, 905 F.2d at 6-7.

In fulfilling its mandate to define the circumstances under which amendments to the Sentencing Guidelines should be applied retroactively, the Sentencing Commission has further limited the discretion of the courts by specifying that they may apply retroactively only those amendments specifically designated by the Commission. Sentencing Guidelines § 1B1.10(a) (Policy Statement) provides that "[w]here a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines * * *, a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. § 3582(c)(2)" only if the amendment is one of those specifically enumerated in subsection (d) of Section 1B1.10. Otherwise, Section 1B1.10(a) provides, "a reduction of the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement."

As petitioner notes, Br. 13, 30 n.25, on September 16, 1992, the Sentencing Commission added Amendment 433 to the list of Guidelines amendments that may be applied retroactively under 18 U.S.C. 3582(c)(2) and Sentencing Guidelines § 1B1.10(d). 57 Fed. Reg. 42,805. That change was made, however, long after petitioner had been sentenced and also after his sentence had been affirmed

by the court of appeals. Because Amendment 433 was not listed in Sentencing Guidelines § 1B1.10(d) at the time the court of appeals affirmed petitioner's sentence, the court was bound by the Sentencing Commission's "authoritative guid[ance]," *Williams* v. *United States*, 112 S. Ct. at 1119, that Amendment 433 should not be given retroactive application. See Sentencing Guidelines § 1B1.10(a) (Policy Statement). Accordingly, the court of appeals did not misapply the Sentencing Guidelines by declining to apply Amendment 433 retroactively to petitioner's case.

***2. The district court properly applied Sentencing Guidelines § 4B1.2 as it stood prior to Amendment 433***

Because the court of appeals was correct not to apply Amendment 433 retroactively, the judgment of the court of appeals must be upheld if the court was correct in its construction of Sentencing Guidelines § 4B1.2 as it stood before the effective date of Amendment 433. We submit that the court was correct in holding that, prior to Amendment 433, possession of a firearm by a previously convicted felon was properly considered a crime of violence at least where, as in this case, the firearm was used to commit a violent crime.[6] An examination of the legislative background to the career offender Guidelines and the case law under those Guidelines provides strong support for that conclusion.

a. The statute outlawing possession of a firearm by a felon, which is now codified at 18 U.S.C. 922(g),

[6] The firearm that was the subject of the felon-in-possession charge (Count 2) was the sawed-off shotgun that petitioner pointed at the bank customer service employee during the October 31, 1989, bank robbery.



was first enacted in 1968.[7] Senator Long, the sponsor of the floor amendment that was enacted into law, described armed felons as "a hazard to law-abiding citizens." 114 Cong. Rec. 13,868 (1968). He explained that felons and other persons barred by the amendment from possessing firearms "have demonstrated that they are dangerous * * * [and] may not be trusted to possess a firearm without becoming a threat to society." *Id.* at 14,773; see *id.* at 14,774. As the Ninth Circuit put it, the felon-in-possession statute was based on "strong congressional conviction that an armed felon poses a substantial threat to all members of society." *United States* v. *O'Neal*, 910 F.2d 663, 667 (1990); see also, *e.g.*, S. Rep. No. 1097, 90th Cong., 2d Sess. 28 (1968); S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968); *Barrett* v. *United States*, 423 U.S. 212, 220 (1976); *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974); *United States* v. *Gant*, 691 F.2d 1159, 1163 n.5 (5th Cir. 1982) (Congress sought "to prevent killings by removing firearms from persons that Congress determined would be most likely to misuse them").[8]

[7] See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202, 82 Stat. 236, as amended by the Gun Control Act of 1968, Pub. L. No. 90-618, § 301, 82 Stat. 1236. In 1986, all offenses concerning the possession, receipt, sale, and transportation of firearms to prohibited persons were consolidated in 18 U.S.C. 922(g). See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102(6), 100 Stat. 452 (1986).

[8] A separate prohibition against receipt of a firearm by a felon, see Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 231, was based on a congressional finding that "the ease with which any person can acquire firearms * * * (including crim-

In 1984, Congress revisited the problem of felons who possess firearms when it enacted the Armed Career Criminal Act (ACCA), Pub. L. No. 98-473, Tit. II, § 1802, 98 Stat. 2185. That Act provided an enhanced penalty for firearms possession by a felon with three previous convictions for certain offenses. In discussing the genesis of that Act, this Court observed that "throughout the history of the [ACCA], Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Taylor* v. *United States*, 495 U.S. 575, 587-588 (1990); see also S. Rep. No. 190, 98th Cong., 1st Sess. 17 (1983) ("[T]he primary purpose of [the ACCA] is to punish third-time offenders who carry a firearm during the commission of the offense because of the danger that such persons pose to the community."). The history of Congress's regulation of firearms possession by convicted felons thus demonstrates that, in Congress's view, the felon-in-possession offense satisfied the statutory definition of a crime of violence, because it involved "a substantial risk that physical force [would be used] against the person or property of another." 18 U.S.C. 16(b).[9]

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inals * * * and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States." § 901(a)(2), 82 Stat. 225; S. Rep. No. 1097, *supra*, at 108.

[9] The statutory definition of "crime of violence" in 18 U.S.C. 16 was used as the definition of "crime of violence" in the original version of Sentencing Guidelines § 4B1.2. See *Guidelines Manual* 4.9 (Apr. 13, 1987).



Congress's concern about the threat of violence from armed felons is amply justified. Each year an estimated 639,000 Americans are victims of violent crimes committed with handguns. Bureau of Justice Statistics, *Handgun Crime Victims* 1 (1990). Thirty-five percent of all violent crimes are committed by offenders armed with guns, *id.* at 4, and many of those offenses are committed by recidivists: In the state criminal justice systems, 43 percent of felons on probation are rearrested for felonies within three years of their release, and one fifth of those arrests are for violent crimes (8.5%) or weapons offenses (1.3%). Bureau of Justice Statistics, *Recidivism of Felons on Probation, 1986-89*, at 1, 6 (1992).[10] Those figures indicate that a large number of felons commit armed, violent crimes soon after their release.

b. The courts that considered the definition of a "crime of violence" in the original version of Sentencing Guidelines § 4B1.2 (Apr. 13, 1987) uniformly

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[10] An earlier study revealed even more alarming numbers: A three-year follow-up study on state prisoners released from custody in 11 States in 1983 revealed that 62.5 percent were rearrested for felonies or serious misdemeanors. Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, at 1 (1989).

The Senate Judiciary Committee reached the following conclusion in connection with its consideration of the ACCA: "It is now well-documented that a small number of repeat offenders commit a highly disproportionate amount of the violent crime plaguing America today. Recent scholarly studies generally establish that approximately six percent of the offenders commit between 50 and 70 percent of the violent crime. The same studies indicate that true career criminals commit such offenses with extremely high frequency. For example, career robbers may engage in 40 or 50 robberies per year while career burglars often commit well over 100 offenses per year." S. Rep. No. 190, *supra*, at 5.

held that the felon-in-possession offense qualified as a crime of violence, at least in some circumstances. The Ninth Circuit concluded that possession of a firearm by a convicted felon would always be a crime of violence under the original version of Section 4B1.2, because the offense "by its nature poses a substantial risk that physical force will be used against person or property." *United States* v. *O'Neal*, 910 F.2d at 667. Other courts concluded that possession of a firearm by a felon was a crime of violence if the firearm was used in a violent crime. See, *e.g.*, *United States* v. *Alvarez*, 914 F.2d 915, 918-919 (7th Cir. 1990) (struggling with a police officer over a firearm renders felon's possession a "crime of violence"), cert. denied, 111 S. Ct. 2057 (1991); *United States* v. *Goodman*, 914 F.2d 696, 698-699 (5th Cir. 1990) (possession of a firearm by a felon, coupled with intent to fire it, constitutes a "crime of violence"); *United States* v. *McNeal*, 900 F.2d 119, 122-123 (7th Cir. 1990) (felon-in-possession offense is a "crime of violence" when there is evidence that the firearm was fired); *United States* v. *Williams*, 892 F.2d 296, 304 (3d Cir. 1989) (same), cert. denied, 496 U.S. 939 (1990); *United States* v. *Thompson*, 891 F.2d 507, 510 (4th Cir. 1989) (possession of a firearm by a felon is a "crime of violence" when the firearm is pointed at victim), cert. denied, 495 U.S. 922 (1990).

As of November 1, 1989, the Sentencing Commission altered the definition of the term "crime of violence." Instead of using the definition from 18 U.S.C. 16 that had been used in the prior version of Section 4B1.1, the Commission used as a model the slightly different language found in the definition of "violent felony" in the Armed Career Criminal Act, 18



U.S.C. 924(e)(2)(B). In its amended form, Section 4B1.2(1) provided as follows:

> The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of injury to another.

*Guidelines Manual* 4.12 (Nov. 1, 1989). The accompanying commentary explained that an offense other than the ones listed is considered a crime of violence when

> (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth in the count of which the defendant was convicted involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another.

The first courts to interpret the 1989 amendment adhered to the position that a felon-in-possession offense could qualify as a "crime of violence." The court below, for example, adopted the position earlier taken by the Ninth Circuit. It held that "the offense of weapons possession by a felon 'by its nature' imposes a 'serious potential risk of injury,'" J.A. 92a-93a, and thus "always constitutes a 'crime of violence,'" so that a felon found guilty of firearms pos-

session "is automatically subject to sentence enhancement under the career offender provisions of the Sentencing Guidelines," J.A. 94a, citing *United States* v. *O'Neal*, 910 F.2d at 667. Other courts reasoned that under the 1989 amendment, as under the prior version of Section 4B1.2, a felon's possession of a firearm could qualify as a crime of violence if the firearm were used in the commission of a violent act. See *United States* v. *Shano*, 947 F.2d 1263, 1267-1268 (5th Cir. 1991), cert. dismissed, 112 S. Ct. 1520 (1992); *United States* v. *John*, 936 F.2d 764, 767-770 (3d Cir. 1991) (felon-in-possession offense is a crime of violence if the defendant used the gun to threaten victims); *United States* v. *Cornelius*, 931 F.2d 490, 493 (8th Cir. 1991) (felon-in-possession offense is a crime of violence if the defendant entered home with a sawed-off shotgun and threatened the occupants); *United States* v. *Walker*, 930 F.2d 789, 793 (10th Cir. 1991) (felon-in-possession offense is a crime of violence if the defendant fired the weapon).

After the Sentencing Commission adopted Amendment 433, several courts took a different approach, construing the 1989 amendment to exclude felon-in-possession offenses, at least in the absence of aggravating circumstances specifically alleged in the indictment. In each of those cases, the court cited Amendment 433 as supporting the restrictive construction. See *United States* v. *Bell*, 966 F.2d 703, 706 (1st Cir. 1992); *United States* v. *Johnson*, 953 F.2d 110, 115 (4th Cir. 1991) ("the offense, felon in possession of a firearm, in the absence of any aggravating circumstances charged in the indictment, does not constitute a *per se* 'crime of violence' under the provisions of [Sentencing Guidelines] § 4B1.2"); *United States* v. *Sahakian*, 965 F.2d 740, 742 (9th Cir. 1992) (repudiating that court's earlier holding in *O'Neal* in light of the 1991 commentary amendment; felon-in-possession offense is not a "crime of violence" where the actual conduct charged in the indictment does not involve a "serious potential risk of physical injury to another"); *United States* v. *Fitzhugh*, 954 F.2d 253, 254-255 (5th Cir. 1992) ("the new commentary makes clear that only conduct charged in [the] indictment may be considered").



A survey of the case law indicates that before the Sentencing Commission set forth its view that felon-in-possession offenses could not qualify as "crimes of violence" for purposes of Sentencing Guidelines § 4B1.2, no court had adopted that position, either under the pre-1989 version of Section 4B1.2 or the post-1989 version. Accordingly, Amendment 433 effected a change in the law with regard to the interpretation of Section 4B1.2. See *United States* v. *Joshua*, 976 F.2d 844, 855 (3d Cir. 1992) (noting that "no court prior to the commentary amendment had interpreted the guideline to mean that possession of a firearm is *never* a crime of violence"); *United States* v. *Sahakian*, 965 F.2d at 742; *United States* v. *Doe*, 960 F.2d at 225 (commentary Amendment 433 is contrary to earlier holdings of several circuits); *United States* v. *Shano*, 955 F.2d 291, 295 (5th Cir.), cert. dismissed, 112 S. Ct. 1520 (1992); *United States* v. *Fitzhugh*, 954 F.2d at 255 (viewing Amendment 433 as a "shift in the law"). As the Eleventh Circuit observed, "[t]he substance of the Commission's change in the commentary runs directly counter to the substantial volume of precedent interpreting section 4B1.2." J.A. 99a.[11]

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[11] Amendment 433 overruled not only those cases holding that a felon-in-possession offense was automatically a crime of

c. To give full retroactive application to Amendment 433 by treating it as merely an explicit statement of what had always been the correct construction of Sentencing Guidelines § 4B1.2 would be erroneous for another reason: It would distort the operation of the Guidelines sentencing scheme for felon-in-possession offenses. Contemporaneously with the adoption of Amendment 433, the Sentencing Commission revised the entire approach of the Guidelines to felon-in-possession offenses committed by multiple offenders. As of November 1, 1991, the Commission amended Sentencing Guidelines § 2K2.1, which deals with firearms offenses, by indexing the defendant's base offense level to the number of his prior felony convictions. In addition, one year earlier, but still four months after petitioner was sentenced, the Commission for the first time promulgated a specific Guideline for armed career criminals, Sentencing Guidelines § 4B1.4. Thus, Amendment 433 was part of a comprehensive sentencing scheme for felon-in-possession offenders. As of November 1, 1991, those offenses no longer fell within the career offender Guideline, but they were now subject to enhanced sentences under either the amended version of Guidelines § 2K2.1 or the Sentencing Guideline covering armed career offenders, Guidelines § 4B1.4.

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violence, but also those cases holding that a court could look beyond the allegations in the indictment to determine whether, in light of the conduct underlying the possession charge, the felon-in-possession offense could be regarded as a crime of violence. The Amendment expressly limited a sentencing court's inquiry to "conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted." See, *e.g.*, *United States* v. *Joshua*, 976 F.2d at 856; *United States* v. *Fitzhugh*, 954 F.2d at 255.



To accord the benefits of Amendment 433 retroactively to a person in petitioner's position would therefore have the incongruous effect of applying only the part of the revised scheme that reduced the Guidelines sentencing range for offenders such as petitioner, while failing to apply another portion of the same scheme that effected a compensating increase in the Guidelines range for the same offenders. That kind of selective application of a part of the overall sentencing scheme could result in an unwarranted windfall for a defendant.[12] The comprehensive nature of the revision to the sentencing scheme for firearms offenders thus serves as a further indication that the change made by Amendment 433 was not intended to be automatically applied retroactively to sentences imposed before the Amendment became effective.

d. Petitioner places heavy reliance, Br. 17-19 & n.11, on the Sentencing Commission's characterization of Amendment 433 as a "clarifying" amendment. See *Guidelines Manual* App. C, at 716 (Nov. 1, 1992) ("This amendment * * * clarifies that the

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[12] Thus, absent the availability of sentencing as a career offender, a multiple offender convicted of possession of a firearm could have a base offense level as low as 12 under the 1989 version of the Guidelines. See Guidelines § 2K2.1 (Nov. 1, 1989). Under the 1991 version of the Guidelines, such an offender would have a base offense level of 24 (under Guidelines § 2K2.1 (Nov. 1, 1991)) or 33 (under Guidelines § 4B1.4 (Nov. 1, 1991)). If the amendments to Sections 2K2.1 and 4B1.4 were inapplicable to such an offender, but he was given the benefit of Amendment 433, he would avoid the level 37 sentence provided in Guidelines § 4B1.1 and would also avoid the enhanced penalties provided in the new Guidelines provisions that were designed to replace Section 4B1.1 as applied to felon-in-possession offenses.

offense of unlawful possession of a weapon is not a crime of violence for the purposes of this section."). He argues that a "clarifying" amendment must be given retroactive effect, while a "substantive" amendment must not.

Petitioner's argument is based on a false dichotomy. There is nothing in the Sentencing Guidelines to indicate that amendments denominated "clarifying" are given retroactive treatment while other amendments are not. To the contrary, as we have noted, changes to a Sentencing Guideline, to a Policy Statement, or to commentary are not retroactive under the Guidelines scheme unless they are so designated in Sentencing Guidelines § 1B1.10(d) (Policy Statement).

It is true, of course, that changes in the Sentencing Guidelines can sometimes illuminate the meaning of particular provisions by permitting the courts "to discern the Sentencing Commission's intent as to application of the pre-amendment guideline." *United States* v. *Saucedo*, 950 F.2d 1508, 1514 (10th Cir. 1991).[13] But a change in a provision of the Guidelines or commentary that dramatically alters the past construction of the provision cannot be regarded as merely illuminating and thereby entitled in effect to be given full retroactive treatment.

Amendment 433 did much more than simply make more explicit what was already apparent from a fair reading of Sentencing Guidelines § 4B1.2. Instead,

[13] See also, *e.g.*, *United States* v. *Thompson*, 944 F.2d 1331, 1347 (7th Cir. 1991), cert. denied, 112 S. Ct. 1177 (1992); *United States* v. *Restrepo*, 903 F.2d 648, 656 (9th Cir. 1990), modified on other grounds, 946 F.2d 654 (1991) (en banc), cert. denied, 112 S. Ct. 1564 (1992); *United States* v. *Aguilera-Zapata*, 901 F.2d 1209, 1213 (5th Cir. 1990); *United States* v. *Guerrero*, 863 F.2d 245, 249-250 (2d Cir. 1988).



it repudiated the congressional understanding regarding the violent nature of the felon-in-possession offense; it overruled a considerable body of circuit court precedent holding that the term "crime of violence" included at least some felon-in-possession offenses; and, most importantly, it was part of a wholesale revision in the way career offenders were sentenced under the Guidelines for firearms crimes. Since Amendment 433 was not in effect at the time of petitioner's sentencing, the court of appeals properly refused to apply the Amendment to petitioner's case. See *United States* v. *Havener*, 905 F.2d at 4 (amendment to the career offender Guideline came "too late to help the appellant, who was sentenced 6 months prior to its effective date"). The court of appeals was equally correct not to reach the same end by characterizing Amendment 433 as "merely clarifying" and treating the definition of "crime of violence" in Sentencing Guidelines § 4B1.2 as if it had excluded all felon-in-possession offenses from the outset.

### C. To Take Advantage Of Amendment 433, Petitioner Must File A Motion In District Court Seeking Resentencing

The Sentencing Commission has recently decided that Amendment 433 may be given retroactive effect. 57 Fed. Reg. 42,805 (1992). It did so by including Amendment 433 among those provisions of the Guidelines listed in Sentencing Guidelines § 1B1.10(d) (Policy Statement) that can be made the subject of a request for resentencing by an already-sentenced defendant based on a subsequent change in the Guidelines reducing the applicable sentencing range. The result is that petitioner ultimately may be able to obtain relief from his sentence by moving

for resentencing under 18 U.S.C. 3582(c)(2) and Sentencing Guidelines § 1B1.10(a) (Policy Statement). He cannot, however, obtain relief on direct appeal from his sentence.

The Sentencing Reform Act of 1984 requires a defendant in petitioner's position to seek relief from the district court. Under 18 U.S.C. 3582(c)(2), a defendant must file a motion in district court seeking the retroactive application of a Guidelines amendment before such an amendment can be applied in a particular case.[14] Moreover, neither 18 U.S.C. 3582(c)(2) nor Sentencing Guidelines § 1B1.10(a) (Policy Statement) *requires* a district court to reduce a defendant's sentence even when the Sentencing Commission provides that a Guidelines amendment may be applied retroactively; both the statute and the Guideline leave that determination to the district court's discretion. See 18 U.S.C. 3582(c)(2) (a court "*may* reduce the term of imprisonment") (emphasis added); Sentencing Guidelines § 1B1.10(a) (Policy Statement) ("a reduction in the defendant's term of imprisonment *may* be considered under 18 U.S.C. § 3582(c)(2)") (emphasis added). Thus, the district court may conclude that, even though one of the Guidelines used to calculate the defendant's sentence

[14] That provision is consistent with the general rule that courts of appeals are not authorized to impose sentence in a criminal case; that power rests in the district court. See 18 U.S.C. 3553, 3742(f); Fed. R. Crim. P. 32. That provision also is necessary in light of the settled rule that district courts lack inherent authority to amend a sentence once the defendant has begun to serve it; the power to revise a sentence already commenced must be granted to the court by statute. See *United States* v. *Addonizio*, 442 U.S. 178, 189 & n.16 (1979); *Affronti* v. *United States*, 350 U.S. 79, 80 (1955); *United States* v. *Murray*, 275 U.S. 347, 358 (1928).



has changed, his ultimate sentence should remain unaltered. In this case, for example, the district court could decide that even if the Amendment had been in effect when petitioner was sentenced, the court would have departed upward from the Sentencing Guidelines range, in light of petitioner's violent past as well as his violent conduct in this case. *E.g.*, J.A. 84a, quoted at page 5, *supra*; see also J.A. 5a-6a, 10a-13a, 17a-24a, 51a-56a, 59a-60a; PSR 1-3, 6-10.

For these reasons, an appellate court cannot simply vacate a defendant's sentence and remand the case to the district court for resentencing when the Sentencing Commission amends a relevant Sentencing Guideline and makes its amendment retroactive. A court of appeals must instead wait for the defendant or the district court to initiate a resentencing hearing in the district court, as contemplated by both the Sentencing Reform Act of 1984 and the Sentencing Guidelines. Accordingly, the proper course for the Court in this case is to affirm the judgment below, with the understanding that petitioner may move in district court under 18 U.S.C. 3582(c)(2) and Sentencing Guidelines § 1B1.10 (Policy Statement) for modification of his sentence in light of Amendment 433.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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## APPENDIX

### STATUTORY PROVISIONS AND SENTENCING GUIDELINES INVOLVED

1. 18 U.S.C. 3553 provides, in part, as follows:

> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> * * * * *
>
> (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;
>
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;
>
> * * * * *

2. 18 U.S.C. 3742 provides as follows:

> (a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government, with the personal approval of the Attorney General or the Solicitor General, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) and (b)



(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly



unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) APPLICATION TO A SENTENCE BY A MAGISTRATE.—An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

3. 18 U.S.C. 3582(c) provides as follows:

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may

not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

4. Sentencing Guidelines § 1B1.3 (Nov. 1, 1992) provides as follows:



**§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

5. Sentencing Guidelines § 1B1.7 (Nov. 1, 1992) provides as follows:

**§ 1B1.7. Significance of Commentary**

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C.



§ 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

6. Sentencing Guidelines § 1B1.10 (Policy Statement) (Nov. 1, 1992) provides as follows:

**§ 1B1.10. Retroactivity of Amended Guideline Range (Policy Statement)**

(a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement.

(b) In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the sentence that it would have originally imposed had

the guidelines, *as amended*, been in effect at that time.

(c) *Provided*, that a reduction in a defendant's term of imprisonment may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered.

(d) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 379, 380, 433, and 461.

7. Sentencing Guidelines § 2K2.1 (Nov. 1, 1992) provides as follows:

**§ 2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

(a) Base Offense Level (Apply the Greatest):

(1) 26, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(2) 24, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or

(3) 22, if the defendant had one prior felony conviction of either a crime of violence



or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(4) 20, if the defendant—

(A) had one prior felony conviction of either a controlled substance offense; or

(B) is a prohibited person, and the offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(5) 18, if the offense involved a firearm listed in 26 U.S.C. § 5845(a); or

(6) 14, if the defendant is a prohibited person; or

(7) 12, except as provided below; or

(8) 6, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), or (m).

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

| *Number of Firearms* | | *Increase in Level* |
|---|---|---|
| (A) | 3-4 | add 1 |
| (B) | 5-7 | add 2 |
| (C) | 8-12 | add 3 |
| (D) | 13-24 | add 4 |
| (E) | 25-49 | add 5 |
| (F) | 50 or more | add 6. |

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2),

(a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.

(3) If the offense involved a destructive device, increase by 2 levels.

(4) If any firearm was stolen, or had an altered or obliterated serial number, increase by 2 levels.

*Provided*, that the cumulative offense level determined above shall not exceed level 29.

(5) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(6) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition in connection



with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

*Commentary*

*Statutory Provisions*: 18 U.S.C. §§ 922(a)-(p), (r), 924(a), (b), (e), (f), (g); 26 U.S.C. § 5861(a)-(1). For additional statutory provisions, *see* Appendix A (Statutory Index).

*Application Notes*:

* * * * *

5. "Crime of violence," "controlled substance offense," and "prior felony conviction(s)," are defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1), subsections (1) and (2), and Application Note 3 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1), (a)(2),

(a)(3), and (a)(4)(A), count any such prior conviction that receives any points under § 4A1.1 (Criminal History Category).

* * * * *

8. Sentencing Guidelines Part 4B (Nov. 1, 1989) provides, in part, as follows:

**§ 4B1.1. Career Offender**

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. * * *

* * * * *

**§ 4B1.2. Definitions of Terms Used In Section 4B1.1**

(1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

* * * * *



*Commentary* [as amended November 1, 1991]

*Application Notes*:

* * * * *

2. * * * * *

The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. When the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristic of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.

* * * * *

9. Sentencing Guidelines § 4B1.4 (Nov. 1, 1992) provides as follows:

**§ 4B1.4. Armed Career Criminal**

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from § 4B1.1 (Career Offender) if applicable; or

(3) (A) 34, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in § 4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(B) 33, otherwise.*

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or § 4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in § 4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or

(3) Category IV.



10. Amendment No. 374 to the Sentencing Guidelines provides as follows:

Chapter Two, Part K, Subpart 2 is amended by deleting §§ 2K2.1, 2K2.2, and 2K2.3 in their entirety as follows:

"2K2.1. *Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition*

(a) Base Offense Level (Apply the greatest):

(1) 18, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861; or

(2) 12, if the defendant is convicted under 18 U.S.C. § 922(g), (h), or (n); or if the defendant, at the time of the offense, had been convicted in any court of an offense punishable by imprisonment for a term exceeding one year; or

(3) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant obtained or possessed the firearm or ammunition, other than a firearm covered in 26 U.S.C. § 5845(a), solely for lawful sporting purposes or collection, decrease the offense level determined above to level 6.

(2) If the firearm was stolen or had an altered or obliterated serial number, increase by 2 levels.

(c) Cross References

(1) If the offense involved the distribution of a firearm or possession with intent

to distribute, apply § 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms) if the resulting offense level is greater than that determined above.

(2) If the defendant used or possessed the firearm in connection with commission or attempted commission of another offense, apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above.

*Commentary*

*Statutory Provisions*: 18 U.S.C. § 922(a)(1), (a)(3), (a)(4), (a)(6), (e), (f), (g), (h), (i), (j), (k), (l), (n), and (o); 26 U.S.C. § 5861(b), (c), (d), (h), (i), (j), and (k). For additional statutory provision(s), *see* Appendix A (Statutory Index).

*Application Notes*:

1. The definition of 'firearm' used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to § 1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of



an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term 'firearm' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.

2. Under § 2K2.1(b)(1), intended lawful use, as determined by the surrounding circumstances, provides a decrease in the offense level. Relevant circumstances include, among others, the number and type of firearms (sawed-off shotguns, for example, have few legitimate uses) and ammunition, the location and circumstances of possession, the nature of the defendant's criminal history (*e.g.*, whether involving firearms), and the extent to which possession was restricted by local law.

*Background*: Under pre-guidelines practice, there was substantial sentencing variation for these crimes. From the Commission's investigations, it appeared that the variation was attributable primarily to the wide variety of circumstances under which these offenses occur. Apart from the nature of the defendant's criminal history, his actual or intended use of the firearm was probably the most important factor in determining the sentence.

Statistics showed that pre-guidelines sentences averaged two to three months lower if the firearm involved was a rifle or an unaltered shotgun, This may reflect the fact that these weapons tend to be more suitable than others for recreational activities. However, some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm. Intended lawful use, as determined by the surrounding circumstances, is a mitigating factor.

Available pre-guidelines data were not sufficient to determine the effect a stolen firearm had on the average sentence. However, reviews of pre-guidelines cases suggested that this factor tended to result in more severe sentences. Independent studies show that stolen firearms are used disproportionately in the commission of crimes.

The firearm statutes often are used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon may be prosecuted for possessing a firearm if he used the firearm to rob a gasoline station. In pre-guidelines practice, such prosecutions resulted in high sentences because of the true nature of the underlying conduct. The cross reference at § 2K2.1(c)(2) deals with such cases.

§ 2K2.2. *Unlawful Trafficking and Other Prohibited Transactions Involving Firearms*

(a) Base Offense Level:

(1) 18, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861;



(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the offense involved distribution of a firearm, or possession with intent to distribute, and the number of firearms unlawfully distributed, or to be distributed, exceeded two, increase as follows:

| *Number of Firearms* | *Increase in Level* |
|---|---|
| (A) 3-4 | add 1 |
| (B) 5-7 | add 2 |
| (C) 8-12 | add 3 |
| (D) 13-24 | add 4 |
| (E) 25-49 | add 5 |
| (F) 50 or more | add 6. |

(2) If any of the firearms was stolen or had an altered or obliterated serial number, increase by 2 levels.

(3) If more than one of the following applies, use the greater:

(A) If the defendant is convicted under 18 U.S.C. § 922(d), increase by 6 levels; or

(B) If the defendant is convicted under 18 U.S.C. § 922(b)(1) or (b)(2), increase by 1 level.

(c) Cross Reference

(1) If the defendant, at the time of the offense, had been convicted in any court of a crime punishable by imprisonment

for a term exceeding one year, apply § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) if the resulting offense level is greater than that determined above.

*Commentary*

*Statutory Provisions*: 18 U.S.C. § 922(a)(1), (a)(2), (a)(5), (b), (c), (d), (e), (f), (i), (j), (k), (l), (m), (o); 26 U.S.C. § 5861(a), (e), (f), (g), (j), and (l). For additional statutory provision(s), *see* Appendix A (Statutory Index).

*Application Notes*:

1. The definition of 'firearm' used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to § 1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term 'firearm' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.



2. If the number of weapons involved exceeded fifty, an upward departure may be warranted. An upward departure especially may be warranted in the case of large numbers of military type weapons (*e.g.*, machine guns, automatic weapons, assault rifles).

*Background*: This guideline applies to a variety of offenses involving firearms, ranging from unlawful distribution of silencers, machine guns, sawed-off shotguns and destructive devices, to essentially technical violations.

§ 2K2.3. *Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense*

(a) Base Offense Level (Apply the greatest):

(1) The offense level from § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the offense that the defendant intended or knew was to be committed with the firearm; or

(2) The offense level from § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), or § 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), as applicable; or

(3) 12.

*Commentary*

*Statutory Provisions*: 18 U.S.C. § 924(b), (f), (g).".

A replacement guideline with accompanying commentary is inserted as § 2K1.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

Chapter Two, Part K, Subpart 2 is amended by deleting § 2K2.5 in its entirety as follows:

"§ 2K2.5. *Possession of Firearms and Dangerous Weapons in Federal Facilities*

(a) Base Offense Level: 6

(b) Cross Reference

(1) If the defendant possessed the firearm or other dangerous weapon with intent to use it in the commission of another offense, apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above.

*Commentary*

*Statutory Provision*: 18 U.S.C. § 930.".

A replacement guideline with accompanying commentary is inserted as § 2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone).

This amendment consolidates three firearms guidelines and revises the adjustments and offense levels



to more adequately reflect the seriousness of such conduct, including enhancements for defendants previously convicted of felony crimes of violence or controlled substance offenses. In addition, § 2K1.5 is amended to address offenses committed within a school zone or federal court facility. **The effective date of this amendment is November 1, 1991.**

* * * * *

11. Amendment No. 433 to the Sentencing Guidelines provides as follows:

Section 4B1.2(2) is amended by deleting "or distribution" and inserting in lieu thereof "distribution, or dispensing"; and by deleting "or distribute" and inserting in lieu thereof "distribute, or dispense".

Section 4B1.2(3) is amended by deleting "Part A of this Chapter" and inserting in lieu thereof "§ 4A1.1(a), (b), or (c)".

The Commentary to § 4B1.2 captioned "Application Notes" is amended in Note 2 by inserting "(*i.e.*, expressly charged)" immediately following "set forth"; by inserting the following at the end:

"Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving

Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.".

The Commentary to § 4B1.2 captioned "Application Notes" is amended in Note 2 by inserting "(including any explosive material or destructive device)" immediately following "explosives".

The Commentary to § 4B1.2 captioned "Application Notes" is amended in Note 3 by inserting the following additional sentences at the end:

"A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).".

This amendment clarifies that the application of § 4B1.2 is determined by the offense of conviction (*i.e.*, the conduct charged in the count of which the defendant was convicted); clarifies that the offense of unlawful possession of a weapon is not a crime of violence for the purposes of this section; clarifies the definition of a prior adult conviction; makes the definitions in § 4B1.2



(2) more comprehensive; and clarifies the application of § 4B1.2(3) by specifying the particular provisions of Chapter Four, Part A to which this subsection refers. **The effective date of this amendment is November 1, 1991.**

* * * * *

12. Amendment No. 461 to the Sentencing Guidelines provides as follows:

Section 4B1.2(3) is amended by deleting the last sentence as follows:

"The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.",

and inserting in lieu thereof:

"The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.".

The Commentary to § 4B1.2 captioned "Application Notes" is amended by deleting the text of Note 2 as follows:

" 'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.

Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (*i.e.*, expressly charged)

in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictionsm for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.",

and inserting in lieu thereof:

" 'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person



of another, or (B) the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device), or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.".

This amendment conforms the definition of "sustaining a conviction" in § 4B1.2 to the definition of "convicted of an offense" in § 4A1.2. In addition, this amendment ratifies a previous amendment to the commentary to § 4B1.2 (amendment 433, effective November 1, 1991) and corrects a clerical error in a reference in that commentary to § 2K2.1. The previous amendment to the text of Application Note 2 clarified that application of § 4B1.2 is governed

by the offense of conviction, and that the offense of being a felon in possession of a firearm is not a crime of violence within the meaning of this guideline. As a clarifying and conforming change, the previous commentary amendment reflected Commission intent that the term "crime of violence," as that term is used in §§ 4B1.1 and 4B1.2, be interpreted consistently with that term as used in other provisions of the Guidelines Manual. For example, § 4B1.4, as promulgated by amendment 355, effective November 1, 1990, provides an increased offense level for a "felon-in-possession" defendant who is subject to an enhanced sentence under 18 U.S.C. § 924(e) and who used or possessed the firearm in connection with a crime of violence (§ 4B1.4(b)(3)(A)). This action to ratify a previous commentary amendment was taken because of concerns raised by *United States* v. *Stinson*, 957 F.2d 813 (11th Cir. 1992), in which the court stated it would not follow amendment 433 because the commentary amendment was not submitted to Congress. **The effective date of this amendment is November 1, 1992.**

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